TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 231.

WESLEY HETRICK, PLAINTIFF IN ERROR,

vs.

VILLAGE OF LINDSEY, FRANK E. SEIGENTHALER, AUDITOR OF SANDUSKY COUNTY, AND HENRY F. SETZLER, TREASURER OF SANDUSKY COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED FEBRUARY 26, 1923.

(29,425)

(29,425)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 231.

WESLEY HETRICK, PLAINTIFF IN ERROR,

vs.

VILLAGE OF LINDSEY, FRANK E. SEIGENTHALER, AUDITOR OF SANDUSKY COUNTY, AND HENRY F. SETZLER, TREASURER OF SANDUSKY COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print.
Proceedings in supreme court of Ohio	1	1
Petition in error	1	1
Proceedings in court of appeals of Sandusky County	4	2
Docket and journal entries; decree	4	2
Findings of facts	8	3
Record from court of common pleas of Sandusky County	12	6
Petition	12	6
Separate answer of Village of Hibbing	17	8
Docket and journal entries; decree	20	9
Motion to dismiss petition in error	23	10
Order dismissing petition in error	24	11
Clerk's certificate	25	12
Return to writ of error	26	12
Petition for writ of error	27	12
Assignment of errors	29	14
Order allowing writ of error	32	15
Writ of error	33	16
Citation and service	35	17
Bond for costs	37	18
Docket entries	39	18
Certificate of lodgment	41	19
Clerk's certificate	42	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1923.

[fol. 1] IN THE

SUPREME COURT OF THE STATE OF OHIO

No. 17645

WESLEY HETRICK, Plaintiff in Error,

vs.

THE VILLAGE OF LINDSEY et al., Defendants in Error.

PETITION IN ERROR—Filed July 17, 1922

Wesley Hetrick, the plaintiff in error, says that at the May Term, A. D. 1922, of the Circuit Court of Appeals, in and for said Sandusky County, Ohio, to-wit on the second day of June, 1922, in certain proceedings on appeal then pending in said court wherein the parties were the same as herein, a judgment and decree of the Court of Common Pleas of said Sandusky County, was sustained in favor of the said defendant in error and against the said plaintiff in error, after making a slight decrease therein.

[fol. 2] And the plaintiff in error says that there is error prejudicial to him in said proceedings, record, judgment and findings of said Circuit Court of Appeals, in this, to-wit:

First. The said Court of Appeals erred in sustaining any finding, judgment or decree of said Court of Common Pleas against this plaintiff.

Second. In holding and decreeing that the proceedings and ordinances of the Village of Lindsey therein involved were legal.

Third. In not holding that the proceedings leading up to and resulting in the special assessment therein involved, were unconstitutional, illegal and void, and in violation of the Fourteenth Amendment of the Constitution of the United States.

Fourth. In not holding that Sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834 and 3835, being the law under which the assessment herein involved was levied is unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amendment of the Constitution of the United States.

Fifth. That the judgment and decree of the Court of Common Pleas and the said Circuit Court of Appeals is contrary to law.

Sixth. Irregularities in the proceedings of the Village of Lind-
[fol. 3] sey, the Court of Common Pleas and the Circuit Court of Appeals by which the plaintiff in error was deprived of due process of law.

Seventh. Error of the Circuit Court of Appeals in overruling plaintiff's motion for a new trial.

Eighth. Other errors apparent upon inspection of the record.

Plaintiff in error therefore prays that said judgment may be reversed and that he may be restored to all things he has lost by reason thereof.

Albert H. Fry, Attorney for Plaintiff in Error.

(Precipe and waiver omitted.)

[fol. 4] COURT OF APPEALS OF SANDUSKY COUNTY, OHIO

No. 124

[Title omitted]

DOCKET AND JOURNAL ENTRIES

1922, Apr. 3.—Transcript of appearance docket and journal entry and all original papers from Common Pleas Court filed.

1922, May 9.—Tried and submitted. Judgment and decree abating assessment in part and confirming it in part, for reasons stated in opinion on file. Remanded for execution. Journal entry to be approved by counsel, each party to pay one-half costs. Journal 1, page 204.

1922, May 18.—Motion for a new trial filed.

1922, May 18.—Application for finding of facts filed.

1922, May 23.—Motion for a new trial filed.

1922, June 2.—Motion of plaintiff for new trial overruled. Motion of defendants for new trial overruled. Exceptions. Journal 1, Page —.

1922, July 5.—Bill of exceptions filed.

[fol. 5] 1922, July 6.—Bill of exceptions delivered to Judges of C. of A.

1922, July 10.—Bill of Exceptions returned to clerk.

1922, July 10.—Finding of facts filed.

Journal 1, page 204:

This cause was heard on the pleadings, the evidence and the arguments of counsel, and on consideration thereof the court finds that at and before the time of the commencement of the proceedings by the Council of the Village of Lindsey, Ohio, to improve Railroad Street in said village by paving, etc., as in its proceedings therefor specified, plaintiff was the owner of the adjoining lots number 175 and 176 in said village; that ever since the commencement of said proceedings for the said improvement of said street plaintiff has been and he is now the owner of said lots; that said lots each abut said improvement; that the actual value of said lots after the completion of said improvement was $2,600.00; that said lots were and are benefited by said improvement to the extent of one-third of said value of $2,600.00; that the claim of plaintiff that the assessment of $1,040.60 levied by the council of said village against said lots for the making of said improvement exceeds the amount that may be lawfully assessed therefor, is sustained; that so much of said assess-

ment as exceeds one-third of $2,600.00 is in excess of the lawful amount that may be levied for said improvement; that the claim of plaintiff that the assessment statutes of Ohio under which said improvement was made are unconstitutional, is not sustained.

[fol. 6] It is therefore ordered that the assessment against said lots for said improvement in the amount of $866.67 be and the same is sustained, and all of said assessment in excess of $866.67 is ordered abated, and the defendants are perpetually enjoined from collecting for the making of said improvement, as the assessment against said lots, any sum in excess of $866.67.

It is ordered that the costs of this case shall be paid, one-half by the plaintiff and one-half by the Village of Lindsey, Ohio, and judgment is rendered against each of said parties for the costs herein ordered to be paid by them.

To each and all of said findings and orders the plaintiff excepts.

To the finding that said real estate was, after the completion of said improvement of the actual value of only $2,600.00 and that the assessment for said improvement should not exceed one-third of said amount of $2,600.00, to said order abating and enjoining the collection of all of said assessment against said lots in excess of $866.67, and ordering the Village of Lindsey, Ohio, to pay one-half of the costs of this case, the Village of Lindsey, Ohio, excepts.

Journal 1, page —:

This cause came on to be heard upon the motion of the plaintiff for a new trial and a finding of facts, and the court being advised in the premises, the court separately states its conclusion of fact filed herewith, and the court being further advised, the motion for a new trial on the part of the plaintiff is hereby overruled, and plaintiff is allowed exception to this ruling of the court.

[fol. 7] And this cause came on further to be heard upon motion of the defendants for a new trial and upon a request upon the part of the defendants that the court state separately its conclusion of facts, and the court being fully advised in the premises, does separately state its conclusion of facts, which are filed herewith together with exception of defendants to certain findings noted therein, which are allowed, and the court being further advised, it is ordered that defendants' motion for a new trial be, and the same is hereby overruled, and an exception to this ruling is allowed to the defendant.

(Duly certified.)

[fol. 8] Circuit Court of Appeals

FINDING OF FACTS—Filed July 10, 1922

And within ten days after the rendition of the decree in this case the plaintiff by his counsel requested the court to separately state its conclusions of facts and of law herein, and thereupon the defendant by its counsel also requested the court to separately state its conclusions of facts and law herein, and the court finds the facts as follows:

1. There never was a date or place set at any time where evidence or proof might be introduced with reference to that ordinance or that improvement, and plaintiff never requested any such date or place to be fixed.

2. The assessment for the improvement involved herein was levied and assessed by the foot front of the property bounding and abutting upon the improvement.

3. No petition was signed for the improvement in question.

4. Notice of the passage of the resolution of necessity for the improvement was served by the clerk in writing on the plaintiff personally on May 10th, 192 ; which with reference to the other proceedings was at a proper time.

5. On March 11th, 1921, a notice was mailed to the plaintiff to the effect that on March 11th, 1921, the council of the Village of Lindsey had passed an ordinance, by which the sum of $1,040.60 had been levied against the property of the plaintiff, which notice was in due course received by the plaintiff.

[fol. 9] 6. That no tice was personally served on the plaintiff at any time other than those mentioned herein.

7. Council of the Village of Lindsey, Ohio, found and determined that it was necessary to improve Railroad Street between the designated points by grading, draining, curbing and paving with brick upon a concrete or crushed stone foundation. The improvement was accordingly made upon a concrete foundation.

8. That the resolution declaring the necessity of the improvement contained all matter and things required by the statutes.

9. That at the time of the passage of said resolution, plans, profiles, estimates and specifications of said improvement were on file as required by law and the improvement made in accordance therewith.

10. An improvement of said street between the points designated by the council was necessary and the council so found.

11. Plaintiff's lots Nos. 175 and 176 in the Village of Lindsey, Ohio, were platted lots and were platted lots at and before the time the proceedings to improve said street were commenced.

12. Plaintiff's lots Nos. 175 and 176 adjoin and each abuts said improvement, a saw mill property is located upon both said lots and a saw mill business transacted thereon.

13. All resolutions and ordinances required by the statute were passed by the council and publications and service of the same was made and all notices were given and all things required by the statutes to be done were properly done by the council and officers of [fol. 10] said village and all proceedings relative to said improvements were regular and in accordance with the statutes, if the mailing of notice of the assessment to plaintiff was in accordance with the statutes, and this court finds that such mailing was in accordance with the statute.

14. The council provided that 3/50th of all the costs and expense of said improvement, also the costs of intersections, should be paid by the village. The village also paid for the cost of the construction of a bridge across the county ditch which crosses said improved

street near plaintiff's lots, no part of which cost was especially assessed against plaintiff's lots.

The remainder of the cost of said improvement was assessed by the foot front upon the property bounding and abutting upon the improvement.

15. The council found and determined by ordinance that the several lots bounding and abutting upon the improvement were each severally especially benefited by the improvement to the extent of their proportionate cost thereof and levied against them each respectively for said improvement.

16. No claims for damages were ever filed.

17. Plaintiff never requested any hearing by or before the council in the matter of said improvements or any of the proceedings relative thereto. Such a hearing was never requested by any one else.

18. Plaintiff resided in Lindsey all the time of the action of the legislation for said improvement and was all the time personally in and about the improvement and during all the time the improvement was being made plaintiff resided in Lindsey and was in and [fol. 11] about Lindsey and knew of and saw the progress of the work at all times and made no objections thereto.

19. Said street improvement was completed about December 1st, 1920.

20. After the work had commenced plaintiff with his counsel appeared before the Village Council and requested that the improvement in front of his said lots be changed so as to eliminate the curbing above the brick on the side next his lots and cause the drainage of the pavement to be in the middle of the street, and this request was granted by the council and the improvement made accordingly.

21. That the actual value of said lots 175 and 176, after the completion of said improvement was $2,600.00.

22. That said lots were and are benefited by said improvement to the extent of one-third of said value of $2,600.00.

23. All meetings of the council were open and held at its usual meeting place.

24. There is no indication of collusion, fraud or bad faith on the part of the council or any of its members.

To finding No. 21, that the actual value of said lots, after the completion of said improvement, was only $2,600.00, the defendant excepts.

And to finding No. 22, that said lots were benefited only to the extent of one-third of $2,600.00, the defendant excepts.

O. K. W. J. Mead, Attorney for the Village of Lindsey, Ohio. O. K. Albert H. Fry, Attorney for Plaintiff.

[fol. 12] IN THE COURT OF COMMON PLEAS OF SANDUSKY COUNTY, OHIO.

[Title omitted]

PETITION—Filed June 8, 1921

The plaintiff avers that the defendant, the Village of Lindsey, is a corporation duly organized under the laws of the State of Ohio, and is situated in Sandusky County; the defendant, Frank E. Seigenthaler is the duly elected, qualified and acting County Auditor of said Sandusky County; the defendant, Henry F. Setzler, is the duly elected, qualified and acting County Treasurer of said Sandusky County.

That the plaintiff is the owner of lots Nos. 175 and 176, bounding and abutting on Railroad Street, between Block Street and Elm Street in said Village of Lindsey.

On the third day of May, A. D. 1920, the village council of the defendant, the Village of Lindsey, adopted a resolution declaring [fol. 13] it necessary to improve the roadway of Railroad Street, from Main Street to Block Street by grading and constructing thereon a brick pavement in accordance with the plans and specifications therefor on file in the office of the village clerk.

The said resoluion further provided that the cost and expense of said improvement should be levied and assessed upon the property bounding and abutting upon said Railroad Street between the points named, by the foot front. On June 7, A. D. 1920, the village council of said defendant, the Village of Lindsey, passed an ordinance to proceed with the said improvement of said street between the points above named in the manner provided for in said resolution.

Afterwards the said village entered into a written contract with A. G. Witte & Son, as contractor for doing said work. Said A. G. Witte & Son did work under said contract on said street which was afterwards accepted by the said defendant, the Village of Lindsey.

That afterwards, on the 11th day of March, A. D. 1921, the said village passed an ordinance levying the sum of $6.05 upon each front foot of property bounding and abutting on said improvement, and thereby levied the sum of $199.65 on lot No. 175 and the further sum of $840.95 on lot No. 176, belonging to the plaintiff, and ordered that said assessment be certified by the Village Clerk to the County Auditor to be placed upon the tax duplicate of the county for collection, which was accordingly done.

The said ordinance levying said assessment upon plaintiff's said [fol. 14] lots and the proceedings of said village providing for the improvement herein mentioned are irregular, illegal and void, and of no effect for the purpose of charging said assessment or any part thereof upon the said lots of plaintiff, for the following reasons:

1. The said improvement was made under and by virtue of Chapter 5, Section 3815 et seq., G. C. of the State of Ohio. The said law is unconstitutional and void for the reason that it does not provide for notice to be given to the owner of the property and an

opportunity to be heard before the tax is levied and is therefore repugnant to and in conflict with Article I, Section 16, and Article I, Section 19 of the Constitution of the State of Ohio, and therefore and for the same reason it is in conflict with and repugnant to Article 14, Section I of the Constitution of the United States.

2. That the defendant, the Village of Lindsey, did not serve notice in writing upon the plaintiff of the resolution declaring it to be necessary to improve the said Railroad Street and did not give the plaintiff an opportunity to be heard upon the question of the necessity of the said improvement of said street.

3. That the defendant, the Village of Lindsey, did not serve notice upon the plaintiff and did not give the plaintiff an opportunity to be heard prior to the adoption of the resolution to proceed.

4. That the defendant, the Village of Lindsey, did not serve notice on the plaintiff, nor did they give the plaintiff an opportunity to be heard before the passage of the ordinance making said levy, [fol. 15] notwithstanding that this defendant was, at the time of the adoption of all of the said resolutions and ordinances, and continuously since has been, a resident of the Village of Lindsey, and of Sandusky County, all of which is repugnant to and in conflict with Article 14, Section I, of the Constitution of the United States, in this, that it does not constitute due process of law as required by said Article 14.

5. The said Village of Lindsey let said contract to A. G. Witte & Son without advertising for bids for the said improvement, and without competitive bidding, contrary to the statute in such case made and provided for.

6. That the various proceedings herein enumerated, nor any of them, nor either of them, were advertised or published in the manner required by law.

7. That all of said proceedings and doings herein enumerated were done without the authority or consent of the plaintiff.

But if it shall be found by the court that the foregoing objections to said assessments are not true and the said assessment is not hereby rendered void, then the plaintiff avers that there should be a substantial reduction in said assessment, for the following reasons:

1. The said assessment is very greatly in excess of the benefits to the lots of this plaintiff, or either of said lots.

2. The said assessment is greatly in excess of the limit allowed by law to be levied upon property for local improvement.

Wherefore, the plaintiff prays that upon the filing of this petition a temporary restraining order may issue restraining the County Trea- [fol. 16] surer from collecting or attempting to collect said assessment or any portion thereof levied upon the plaintiff's said lots, that upon the final hearing of this cause said assessment may be adjudged null and void, and that the defendants and each of them may be enjoined from collecting or attempting to collect the same and for all other and proper relief.

Albert H. Fry, Attorney for Plaintiff.

(Verification and præcipe omitted.)

[fol. 17] COMMON PLEAS COURT

SEPARATE ANSWER OF THE VILLAGE OF LINDSEY—Filed Sept. 19, 1921

This answering defendant admits that it is a corporation duly organized under the laws of the State of Ohio, and is situated in Sandusky County, Ohio; that the defendant Frank E. Siegenthaler is the duly elected, qualified and acting County Auditor of said Sandusky County; that the defendant Henry F. Setzler was at the time of the filing of the petition herein, the duly elected, qualified and acting County Treasurer of said Sandusky County; that the plaintiff is the owner of lots numbers 175 and 176, bounding and abutting on Railroad Street between Block Street and Elm Street in said Village of Lindsey; that on the 3rd day of May, 1920, the village council of said Village of Lindsey, adopted a resolution declaring it necessary to improve said Railroad Street from Main Street to Block Street by grading and constructing thereon a brick pavement, etc., in accordance with the plans and specifications therefor on file in the office of the village clerk; that said resolution provided that the cost and expense of said improvement should be levied and assessed upon the property bounding and abutting upon said Railroad Street between the points named, by the foot front, except that this defendant avers that said resolution provided that three-fiftieths of the whole cost of the said improvement and the cost of intersections should be paid by said village.

[fol. 18] This answering defendant further admits that on June 7th, 1920, the village council of said Village of Lindsey passed an ordinance to proceed with said improvement of said street between the points named and in the manner provided for in said resolution; that afterwards said village entered into a written contract with A. G. Witte and Son as contractor for doing said work; that said A. G. Witte and Son did work under said contract on said street which was afterwards accepted by said village, and this defendant avers that said contractor did all the work in the improvement of said street, that said work of said street improvement was completed and accepted by said village and said contractor was fully paid before plaintiff filed his petition herein.

This answering defendant admits that on the 11th day of March, 1921, the council of said village passed an ordinance levying the sum of $6.05 upon each foot front of the property bounding and abutting on said improvement and thereby levied the sum of $199.65 on said lot number 175, and the further sum of $840.95 on said lot number 176 belonging to the plaintiff, and ordered that said assessment be certified to the County Auditor of Sandusky County, Ohio, as specified in said ordinance, and that the first installment of said assessment has been certified by the clerk of said village to said county auditor, but it avers that it was provided in said ordinance that said assessment was payable in cash within thirty days from said levy upon due notice being given, and that if not so paid in cash

the installments of said assessments should be certified by the clerk [fol. 19] of said village to said county auditor on or before the second Monday in September annually to be by said county auditor placed upon the tax duplicate and collected as other taxes are collected.

This answering defendant admits that said improvement was made under and by virtue of Chapter 5, Div. 111, Tit. XII, Section 3812 et seq., of the General Code of Ohio; that plaintiff was at the time of the adoption of all of the resolutions and ordinances relative to said street improvement and continuously since has been a resident of said Village of Lindsey, Ohio, and this answering defendant avers that plaintiff solicited and encouraged the making of said improvement, that he had full knowledge of all proceedings relative thereto prior to and at the time such proceedings were taken, that he had full knowledge of the character and progress of the work of said improvement as same proceeded, that he consulted with the council of said village as to the manner of the construction of said improvement and was by said council given full hearing, that he encouraged and was largely instrumental in procuring said improvement construction to be made in the manner in which it was made, that he at all times both before the commencement of said work and during its entire progress knew that he was to be charged with the proper proportionate cost thereof and that he made no objection to said improvement or the proposed assessment therefor prior to the filing of his [fol. 20] petition herein, and this defendant denies each and every averment in plaintiff's petition which is not hereinbefore specifically admitted.

The Village of Lindsey, Ohio, By W. J. Mead, Its Attorney.

(Duly verified.)

Common Pleas Court

Docket and Journal Entries

1921, June 8.—Petition and precipe filed.

1921, June 8.—Summons issued to Sheriff of Sandusky Co.

1921, June 20.—Summons returned and filed, endorsed as follows: Received this writ June 9, 1921, at 3 o'clock P. M. and pursuant to its command I summoned the within named Village of Lindsey by C. L. Blaker, Mayor of said Village, Frank E. Seigenthaler, Henry F. Setzler, Treasurer of said county by handing to each of them personally on June 18, 1921, a true and certified copy of this writ with all the endorsements thereon. O. C. Ballard, Sheriff.

1921, Aug. 8.—Defendant is given thirty days to plead. Journal 53, page 195.

1921, Sept. 15.—Leave granted to defendants to plead in 10 days. Journal 53, page 248.

1921, Sept. 19.—Answer of the Village of Lindsey filed.

[fol. 21] 1921, Oct. 10.—Cause continued.

1922, Jan. 2.—Cause continued.

1922, Jan. 26.—Petition dismissed at plaintiff's costs. Appeal bond fixed at $200.00. Journal 53, page 453.
1922, Feb. 28.—Appeal bond filed.

Common Pleas Journal, 105th day, Aug. 8, 1921, April Term, Journal 53, page 195:

Defendant is given thirty days to plead.

Common Pleas Journal, 134th day, Sept. 15, 1921, April Term, Journal 53, page 248:

Leave granted defendants to plead within ten days.

Common Pleas Journal, 22nd day, Jan. 26, 1922, Jan. Term, Journal 53, page 453:

This cause was heard on the pleadings, the evidence and the arguments of counsel, and on consideration thereof the court finds that the claim of the plaintiff that the assessment levied by the council of the Village of Lindsey, Ohio, for the improvement of Railroad Street in said village, upon the property of the plaintiff described in his petition, to-wit, lots number one hundred and seventy-five and one hundred and seventy-six, in said village, is in excess of the amount that may be lawfully assessed therefor, is not sustained.
The court also finds that the other claims of plaintiff against the validity of said assessment are not sustained.
The court therefore finds against the plaintiff and in favor of said defendant the Village of Lindsey, Ohio.
It is therefore adjudged and decreed on this the 26th day of [fol. 22] January, 1922, that the plaintiff's petition be and the same is dismissed at plaintiff's costs taxed in the sum of $— for which amount judgment is hereby rendered against plaintiff, and plaintiff giving notice of his intention to appeal this cause to the Court of Appeals of Sandusky County, Ohio, the appeal bond therefor is fixed in the sum of $00.00.
(Duly certified.)

[fol. 23] In the Supreme Court of the State of Ohio

No. 17645

[Title omitted]

Motion to Dismiss

(Filed in Supreme Court Oct. 23, 1923)

Defendant in error moves the court to dismiss the petition in error of the plaintiff in error herein for the following reasons:
1. The petition in error herein was filed by the plaintiff in error without leave of this court first granted, he claiming that the case

involves a question under the constitution of the United States, in that the statutes of the state of Ohio relating to special assessments for street improvements are unconstitutional in that they are contrary to the Fourteenth Amendment of the Constitution of the United States, when in fact these statutes have so long been held constitutional by the courts of this state and have so long been accepted and followed in the practice of this state as constitutional, that their constitutionality can no longer be questioned, and the petition in error herein should not be filed as a matter of right and it is now on file without authority or right.

W. J. Mead, Attorney for Defendant in Error.

October 16, 1922.

On this date received a copy of the above motion.

Albert H. Fry, Attorney for Plaintiff in Error.

[fol. 24] STATE OF OHIO,
City of Columbus:

SUPREME COURT OF THE STATE OF OHIO, OF THE TERM OF JANUARY, A. D. 1922, TO WIT, TUESDAY, DECEMBER 5TH

[Title omitted]

ORDER DISMISSING CASE

Motion by Defendant to Dismiss Petition in Error in Cause No. 17645 on the General Docket

It is ordered by the court that this motion be, and the same hereby is, sustained, and that the petition in error herein be, and the same hereby is, dismissed.

It is further ordered that the defendant in error recover *recover* from the plaintiff in error its costs herein expended, taxed at $—.

Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal No. 29 Page 296.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 21st day of December A. D. 1922.

Seba H. Miller, Clerk. (Seal of the Supreme Court of the State of Ohio.)

[fol. 25] STATE OF OHIO,
City of Columbus, ss:

SUPREME COURT OF THE STATE OF OHIO, OF THE TERM OF JANUARY, A. D. 1922

CLERK'S CERTIFICATE

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the *the* foregoing is a true and correct copy of the transcript of record filed in Cause No. 17645—Wesley Hetrick v. The Village of Lindsey, et al., in the Supreme Court of the State of Ohio under date of August 7, 1922; and that attached to said transcript of record is a true and correct copy of motion by defendant to dismiss the petition in error, and the journal entry thereon, in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 21st day of December, A. D. 1922.

Seba H. Miller, Clerk Supreme Court of Ohio. (Seal of the Supreme Court of the State of Ohio.)

[fol. 26] UNITED STATES OF AMERICA:

SUPREME COURT OF THE STATE OF OHIO

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United Sates a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, in the City of Columbus, this 17th day of February, A. D. 1923.

Seba H. Miller, Clerk Supreme Court of Ohio. (Seal of the Supreme Court of the State of Ohio.)

[fol. 27] IN THE SUPREME COURT OF THE STATE OF OHIO

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Feb. 7, 1922

To the Honorable Carrington Marshall, Chief Justice of the Supreme Court of the State of Ohio:

Now comes Wesley Hetrick, of Sandusky County, Ohio, and alleges that this plaintiff in error brought this action against the Vil-

lage of Lindsey, Frank E. Seigenthaler, County Auditor, and Henry F. Setzler, County Treasurer, and that upon the trial of this cause the Court of Common Pleas of Sandusky County, Ohio, dismissed the petition of plaintiff in error for an injunction restraining the collection of certain special assessments.

Plaintiff in error further alleges that on the fifth day of December, A. D. 1922, final judgment was rendered against your petition by the Supreme Court of the State of Ohio, that being the highest court of law or equity in the said state of Ohio, wherein it was adjudged that the Court of Common Pleas of Sandusky County, Ohio, did not err in dismissing the petition for injunction; that the Court of Appeals of Sandusky County, Ohio, did not err in sustaining the finding or decree of said Court of Common Pleas against this plaintiff; that the said Court of Appeals did not err in not holding that the proceedings leading up to and resulting in the special assessment therein involved were unconstitutional, illegal and void and in violation of th fourteenth Amendment of the Constitution of the United States; that the said Court of Appeals did not err in not holding that sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834, and 3835 being the law under which the assessment herein involved was levied is unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amendment of the Constitution of the United States, and wherein it was by said Supreme Court of the State of Ohio further adjudged that the said assessment is a valid law and not in violation of and repugnant to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

[fol. 28] All of which appears in the record and final judgment of the said Supreme Court of the State of Ohio affirming the judgments of the Court of Appeals and Court of Common Pleas of Sandusky County, Ohio.

Wherefore, your petitioner prays for an allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in said case may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected, and said judgment reversed, and said cause remanded for further proceedings, and your petitioner will ever pray.

Wesley Hetrick, By Albert H. Fry, His Attorney.

The Writ of Error as prayed for in the foregoing petition is hereby allowed this sixth day of February, 1923, and the bond for costs is fixed at the sum of two hundred fifty dollars ($250.00).

Dated at the City of Columbus, Ohio, this sixth day of February, 1923.

C. T. Marshall, Chief Justice, Supreme Court of the State of Ohio.

[File endorsement omitted.]

[fol. 29] SUPREME COURT OF THE UNITED STATES, —— TERM, 1922

No. 17645

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 17, 1922

Wesley Hetrick, the plaintiff in error, says that at the January term, A. D. 1922, of the Supreme Court of Ohio, to-wit, on the 5th day of December, A. D. 1922, in certain proceedings in error, then pending in said court, wherein the parties were the same as herein, a judgment and decree was entered, sustaining a judgment and decree of the Court of Common Pleas of Sandusky County, Ohio, and the Circuit Court of Appeals of Sandusky County, Ohio, in favor of the defendant in error and against the plaintiff in error.

And the plaintiff in error says that there is error prejudicial to the plaintiff in error in said proceedings, record, decree, and findings of the said Supreme Court in this, to-wit:

First. The Supreme Court erred in sustaining any finding, judgment or decree of the Court of Common Pleas of Sandusky County or of the Circuit Court of Appeals of Sandusky County, Ohio, against this plaintiff.

Second. The said Supreme Court erred in holding and decreeing that the proceedings and ordinances of the Village of Lindsey involved in said cause were legal and constitutional.

Third. The said Supreme Court erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal and void, and in violation of the Fourteenth Amendment of the Constitution of the [fol. 30] United States, in this that they did not constitute due process of law as required by said amendment.

Fourth. The said Supreme Court erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal, and void and in violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that proper notice was not given to the plaintiff in error and no hearing or opportunity to be heard was granted to said plaintiff in error before the assessment in question became a finality and constituted a lien on his property, as required by said Fourteenth Amendment.

Fifth. The said Supreme Court erred in not holding that sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834, and 3835, being the law under which the assessment herein involved was levied, are unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amndment of the Constitution of the United States.

Sixth. The said Supreme Court erred in not holding that the sections of the code enumerated in the fifth assignment of error are un-

constitutional and illegal by reason of the fact that it does not provide for a proper notice and does not provide for a hearing or an opporunity to be heard with reference to an assessment before it becomes a finality as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Seventh. The said Supreme Court erred in not finding that the judgment and decree of the Court of Common Pleas and of the said Circuit Court of Appeals is contrary to law.

Eighth. The said Supreme Court erred in not finding and holding that there were irregularities in the proceedings of the Village of [fol. 31] Lindsey in connection with said assessment by which and in consequence of which the plaintiff in error was deprived of property without due process of law.

Ninth. That the said Supreme Court erred in not reversing the judgment and decree of the Court of Common Pleas of Sandusky County and the judgment and decree of the Circuit Court of Appeals of Sandusky County on the ground that the assessment deprived the plaintiff in error of property without due process of law and was, therefore, illegal and void and in violation of the requirements of the Fourteenth Amendment of the Constitution of the United States.

Tenth. For other errors apparent upon the inspection of the record, committed by the said Supreme Court in said cause.

That said judgment and decree may be reversed and that he may be restored to all things that he has lost by reason thereof.

Albert H. Fry, Attorney for Plaintiff in Error.

[File endorsement omitted.]

[fol. 32] IN THE SUPREME COURT OF THE STATE OF OHIO

No. 17645

[Title omitted]

ORDER ALLOWING WRIT OF ETTOR—Filed Feb. 7, 1922

The above entitled cause coming on to be heard upon the petition of plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Cout of the State of Ohio, and upon examination of said petition and the record in said cause and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record of said cause:

It is ordered that a writ of error be, and the same is hereby allowed from this Court to the Supreme Court of the United States upon the presentation and approval of a bond by the petitioner.

Columbus, Ohio, February 6, 1923.

C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[File endorsement omitted.]

[fol. 33] IN THE SUPREME COURT OF THE STATE OF OHIO

No. 17645

[Title omitted]

WRIT OF ERROR—Filed Feb. 7, 1922

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said State in which decision could be had in said suit between Wesley Hetrick and the Village of Lindsey et al., wherein was drawn in question the validity of the statute of said State and the validity of certain proceedings of the said Village of Lindsey on the ground of being repugnant to the provisions of the Constitution of the United States, and the amendments thereto and said decision was in favor of such, its validity, *in* manifest error hath happened, to the great damage of the said Wesley Hetrick as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the — day of March, 1923, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

[fol. 34] Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States the seventh day of February in the year of our Lord, 1923.

B. E. Dilley, Clerk U. S. District Court, S. D. of Ohio, By C. P. White, Jr., Deputy. (Seal of United States District Court, Southern D. of Ohio.)

Allowed by

C. T. Marshall, Chief Justice of the Supreme Court of Ohio.

[File endorsement omitted.]

[fol. 35] IN THE SUPREME COURT OF THE STATE OF OHIO

No. 17645

[Title omitted]

CITATION AND SERVICE—Filed Feb. 17, 1922

UNITED STATES OF AMERICA, *ss:*

To the Village of Lindsey, Frank E. Seigenthaler, Auditor Sandusky County, and Henry F. Setzler, Treasurer Sandusky County, Ohio, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days of the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Ohio, wherein Wesley Hetrick is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered herein against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that half.

Dated 6th day of February, 1923.

C. T. Marshall, Chief Justice of the Supreme Court of Ohio.

It is hereby ordered that William Writ, sheriff of Sandusky County, Ohio, be deputized to serve the foregoing citation and that his return of service be made by affidavit, the same to be attached to and filed with the Citation in this cause.

C. T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fol. 36] STATE OF OHIO,
County of Sandusky, ss:

William Wirt, of lawful age, being first duly sworn, says: My name is William Wirt, I am the duly qualified sheriff of Sandusky County, Ohio and I was duly authorized and deputized by Honorable C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio, to serve upon the defendants in error the citation hereto attached. I served the same by handing personally to, Calvin Bloker, Mayor of the Village of Lindsey, Frank E. Seigenthaler, Auditor of Sandusky County, Ohio and Frank L. Yerges Treasurer of Sandusky County, Ohio, successor to Henry Setzler named in said writ, each, a true and certified copy of said citation with all indorsements thereon at Sandusky County, Ohio, February 17, 1923.

William T. Wirt.

Sworn to before me and subscribed in my presence this 17th day of February, 1923.

E. C. Sturm, Notary Public, Sandusky County, Ohio.
[Notarial Seal, Sandusky County, Ohio.]

Mileage, $1.28; Service $1.25
1.28

2.53

[File endorsement omitted.]

[fols. 37 & 38] In the Supreme Court of the State of Ohio

No. 17645

Bond for $250.00 for Costs Approved, Marshall, C. J.—[Omitted in Printing]

[fol. 39] Supreme Court of the State of Ohio, January Term, A. D. 1923

Docket and Minute Entries

(Minute Book No. 37, Page 45)

No. 17645

Title of Case

Wesley Hetrick, Plaintiff in Error,

v.

The Village of Lindsey et al.

Action: Error to the Court of Appeals of Sandusky County.
Attorneys: Albert H. Fry, Fremont, Ohio, for plaintiff in error; W. J. Mead, Fremont, Ohio, for defendant in error.

Transcript of Docket Entries, Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders, and Decrees

1922.

July 17th. Petition in error (as of right) precipe and waiver of summons filed.

" " Court of appeals transcript, original papers and bill of exceptions filed.

" " Papers sent to The H. J. Chittenden Company, Toledo, Ohio by express. Aug. 7, 1923, returned.

" 31st. Plaintiff's printed briefs filed. Proof of service by affidavit filed. Aug. 3, 1922, proof of service, receipt filed.

Aug. 7th. Printed record and affidavit of service filed.
" 11th. Proof of service card filed.
" 28th. Plaintiff's printed briefs returned to The H. J. Chittenden Co.
Sept. 1st. Printer's receipted bill filed.
" 7th. Plaintiff's printed briefs returned by The H. J. Chittenden Co.
Oct. 11th. Defendant's printed briefs and proof of service filed.
" 23rd. Motion by defendant to advance and consent filed, overruled. Journal No. 29, page 277.
" 23rd. Motion by defendant to dismiss and proof of service filed, sustained. Journal No. 29, page 296.
Dec. 12th. Certified copy of entry sent to Clerk.
" 12th. Original papers and bill of exceptions sent to Clerk.

1923.
Feb. 7th. Petition for writ of error, order allowing writ and assignment of errors filed.
" " Citation issued for defendants to Sheriff of Sandusky County, returnable forthwith.
" " Writ of error filed.

[fol. 40] *Transcript of Journal Entries*

1922.
Nov. 7th. Motion by defendant to advance case No. 17645, on the General Docket.

"It is ordered by the court that this motion be, and the same hereby is, overruled."
Journal No. 29, page 277.

Dec. 5th. Motion by defendant to dismiss petition in error in cause No. 17645, on the General Docket.

"It is ordered by the court that this motion be, and the same hereby is, sustained, and that the petition in error herein be, and the same hereby is, dismissed.
"It is further ordered that the defendant in error recover from the plaintiff in error its costs herein, expended, taxed at $—."
Journal No. 29, page 296.

[fol. 41] IN SUPREME COURT OF OHIO

CERTIFICATE OF LODGMENT

SUPREME COURT

STATE OF OHIO, *ss:*

I, Seba H. Miller, Clerk of the said Court, do hereby certify that there was lodged with me as said Clerk on February 14th, 1923, in the matter of Wesley Hetrick, plaintiff in error, versus The Village of Lindsey et al., defendants in error:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Columbus, Ohio, this 17th day of February, 1923.

Seba H. Miller, Clerk Supreme Court of Ohio. [Seal of the Supreme Court of the State of Ohio.]

[fol. 42] IN THE SUPREME COURT OF OHIO

No. 17645

WESLEY HETRICK, Plaintiff in Error,

v.

THE VILLAGE OF LINDSEY et al., Defendants in Error.

CLERK'S CERTIFICATE

STATE OF OHIO,
City of Columbus, ss:

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for a writ of error, assignment of errors, order allowing writ, writ of error, citation and return of service thereof, are the original papers filed in this court in the above entitled cause; that the copy of the bond is a true and correct copy of the original bond filed in said cause; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said Supreme Court and used in the consideration of said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said Court, and that no opinion was rendered by the court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 17th day of February, A. D. 1923.

Seba H. Miller, Clerk Supreme Court of Ohio. [Seal of the Supreme Court of the State of Ohio.]

Endorsed on cover: File No. 29,425. Ohio Supreme Court. Term No. 231. Wesley Hetrick, plaintiff in error, vs. Village of Lindsey, Frank E. Seigenthaler, auditor of Sandusky County, and Henry F. Setzler, treasurer of Sandusky County. Filed February 26th, 1923. File No. 29,425.

IN THE

Supreme Court of the United States

No. 29425

October Term, 1923.
No. 231.

WESLEY HETRICK,

Plaintiff in Error.

vs.

VILLAGE OF LINDSEY, FRANK E. SIEGENTHALER, AUDITOR OF SANDUSKY COUNTY, AND HENRY SETZLER, TREASURER OF SANDUSKY COUNTY,

Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case grows out of a special assessment levied by the Village of Lindsey, on the real estate owned by the plaintiff in error, abutting on Railroad Street, in Lind-

sey. Under Section 3812 of the Ohio code assessments may be made by one of three methods: first, by a percentage of the tax value of the property assessed, second, in proportion to the benefits which may result from the improvement, and, third, by the foot frontage of the property bounding and abutting on the improvement.

On May 3rd, 1920, the Council of the Village of Lindsey passed a resolution of necessity for the improvement of Railroad street. In that resolution they also determined the method of assessment to be by the front foot, in accordance with Section 3815, of the Ohio code. On May 10th, 1920, a notice of the passage of the resolution of necessity was served on the plaintiff in error. On March 11th, 1921, a notice was mailed to the plaintiff in error to the effect that on March 11th, 1921, the Council of the Village of Lindsey has passed an ordinance by which the sum of $1,040.60 had been levied against the property of the plaintiff in error. There never was a date or place set at any time where evidence or proof might be introduced with reference to the ordinance or the improvement. No notice was served on the plaintiff in error at any time other than those mentioned above. No hearing was ever had. Plaintiff in error filed a petition in the Court of Common Pleas, setting up the facts as above, asking for an injunction on the ground that the proceeding was illegal, and null, and void, because it was repugnant to and in conflict with Article 14, Section 1, of the Constitution of the United States, and for other reasons, among them that it exceeded 33 1/3% of the value, contrary to Section 3819 of the Code. A hearing was had and the petition dismissed. Plaintiff in error appealed to the Circuit Court of Appeals, setting up the same grounds of error. That court reduced the value of the property and automatically abated the assessment about $175.00, and affirmed the lower court, assessing

one-half of the costs against plaintiff. Plaintiff in error filed a petition in error in the Supreme Court of Ohio, setting up the same error. A motion was made in that court by the defendant in error to dismiss the petition in error on the ground that "the petition in error herein was filed by the plaintiff in error without leave of this court first granted, he claiming that the case involved a question under the Constitution of the United States, in that the statutes of the State of Ohio relating to special assessments for street improvements are unconstitutional in that they are contrary to the Fourteenth Amendment of the Constitution of the United States, when, in fact, these statutes have so long been accepted and followed in the practice of this state as constitutional, that their constitutionality can no longer be questioned." The court sustained the motion, and dismissed the petition without opinion. Plaintiff in error then filed his petition for a writ of error with the chief justice of the Supreme Court of the State of Ohio, and obtained an order allowing the writ.

SPECIFICATION OF ERROR.

First. The Supreme Court of Ohio erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal and void, and in violation of the Fourteenth Amendment of the Constitution of the United States, in this that they did not constitute due process of law as required by said amendment.

Second. The said Supreme Court erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal and void and in violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that proper notice was not

given to plaintiff in error, and no hearing or opportunity to be heard was granted to said plaintiff in error before the assessment in question became a finality, and constituted a lien on his property, as required by said Fourteenth Amendment.

Third. The Supreme Court erred in not holding that Sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834 and 3835, being the law under which the assessment herein involved was levied, are unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amendment of the Constitution of the United States, in this that it constituted a rule which excludes any inquiry as to special benefits, and the necessary operation of which is to the extent of the cost in excess of any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation.

Fourth. The said Supreme Court erred in not holding that the sections of the code enumerated in the third assignment of error are unconstitutional and illegal by reason of the fact that it does not provide for a proper notice, and does not provide for a hearing or an opportunity to be heard with reference to the assessment before it becomes a finality as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

BRIEF AND ARGUMENT.

I.

Before an assessment of taxes can be made upon property, *notice to the taxpayer, with an opportunity to be heard, is essential,* and somewhere during the process of the assessment, the taxpayer must have an opportu-

nity to be heard, and *such notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.*

Central of Georgia Railroad Co. vs. Wright, 207 U. S. 127;
Stuart vs. Palmer, 74 N. Y. 183.

II.

The statute which authorizes the levy of a special assessment under a rule which excludes any inquiry as to special benefits violates the Fourteenth Amendment of the Federal Constitution.

Norwood vs. Baker, 172 U. S. 269;
Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112;
Winona & St. Peter Land Co. vs. Minnesota, 159 U. S. 701;
Goodrich vs. Detroit, 184 U. S. 432.

III.

Many requirements essential to strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here *a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal.*

Londoner vs. Denver, 210 U. S. 373.

The first finding of fact by the Court of Appeals of Sandusky County (Record 4) as follows:

> *"There never was a date or place set at any time where evidence or proof might be introduced with reference to that ordinance or that improvement."*

and the further finding by the Court of Appeals, that the only notice given the plaintiff in error was a notice of the passage of that resolution of necessity which was served seven days after its passage, and a notice mailed on the 11th day of March, 1921, to the effect that on March 11th, 1921, the Council had levied an assessment against plaintiff's property, were the only notices pretended to be served upon the plaintiff in error, creates the question and the only question in the case before this court, which may be stated as follows: Can a valid assessment be levied without notice to the owner of the property and without an opoprtunity to be heard with reference to the benefits derived, as compared with the amount of the assessment levied against the property. If this question is decided in the negative, it disposes of another question which may be stated as follows: Can a special assessment be legally levied under a statute which does not provide for notice and does not provide for a hearing with reference to the benefits derived from the improvement?

This case presents a somewhat novel situation, which may be stated in a few words. In *Norwood vs. Baker*, this court sustained the contention of the plaintiff in error that the statute under which that assessment was levied was unconstitutional upon the ground "that the assessment was made under a rule which excluded any inquiry as to special benefits." *The defect pointed out by this court in that case has never been remedied,* as is shown by the corresponding section of the present statute set opposite the sections passed upon by this court in the Norwood case, as follows:

NORWOOD VS. BAKER	HETRICK VS. LINDSEY
Sec. 2263. grants power to the Council to assess the whole or any part of a public improvement upon all of the taxable real estate in the corporation.	Sec. 3812, provides that the Council may assess upon the abutting, adjacent, contiguous or other special benefited lots in the corporation any part of the entire cost of an expense connected with the improvement.
Sec. 2264, provides that in case any part is to be assessed, it may be done "either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement.	Sec. 3812, provides that the assessment shall be "by any of the following methods: First, by the percentage of the tax value of the property assessed. Second, in the proportion to the benefits which may result from the improvement, or Third, by the front foot of the property bounding and abutting upon the improvement."
Sec. 227, provides for the appointment of a commission in case of assessment according to benefits.	Sec. 3847, provides for a commission "when it is determined to assess the whole or part of the cost of an improvement in proportion to the benefit which may result therefrom."
Sec. 2277, limits the assessment to be "in proportion as nearly as may be to the benefits which may result from the improvement."	Sec. 3819, provides that "the Council shall limit all assessments to the special benefits conferred upon the property assessed."
Sec. 2271, limits the assessment to 25% of the value of such lot.	Sec. 3819, limits the assessment to 33 1/3% of the value of the lot.

Assessment was made by the front foot method without any hearing and "without any right in the property owner to show when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received."

"The assessment was by the front foot and for a specific sum, representing such cost, and the sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abuttfng property exceeded the special benefits."

(Mandate) ."The judgment of the Circuit Court must be affirmed upon the ground that the assessment was under a rule which excluded any inquiry as to special benefits and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accrued to the abutting property therefrom to take private property for public use without compensation. It is so ordered."

Assessment made by the front foot method without any hearing and "without any right in the property owner to show when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received."

Precisely the same conditions existing as in *Norwood vs. Baker.*

The rule mentioned in *Norwood vs. Baker* is continued in precisely the same shape and in no particular has the statute or the rule been changed to conform with the decision in *Norwood vs. Baker.*

A reference to the sections of the statute covering this particular mode of assessment added hereto as an appendix will show that no notice of a hearing and no hearing is provided for as required by the *Norwood*

case. The corollary of this state of facts is that the assessment herein complained of is illegal, or *Norwood vs. Baker* and all the cases which have followed it must be overruled. Counsel for defendant in error in the court below contended that since Section 12075 gave the Court of Common Pleas jurisdiction to entertain a petition for an injunction, it constituted due process of law. This, however, apparently was not the notion of this court in the *Norwood* case, because at the time the *Norwood* case was pending before this court, Section 12075 was in the statutes of Ohio as Section 5848, and the Supreme Court of Ohio likewise, in *Railroad vs. Wagner*, 43 O. S. 75, says:

> "We must deal with the proceeding as one seeking to subject the plaintiff and its general property to all the incidents of a personal judgment; and we cannot suppose that the provisions we are construing were intended so far to dispense with jurisdictional facts as to ignore, in such a case, that fundamental principle of our law which hears before it condemns and to place upon a party the burden of showing, by vexatious and expensive litigation, that he has been injured by an unauthorized proceeding to charge him and his estate, of which he has neither notice nor knowledge."

In *Joyce vs. Barron*, 67 O. S. 265, the Supreme Court of Ohio says at page 274, in speaking of the claim of an independent suit:

> "This proposition is without merit. She did not have to. No such duty devolved upon her. The city had taken her property, and it was encumbent upon it to so conduct its improvement proceedings as to result in an ascertainment of her damages, or an adjudication, that none had been sustained, in the proper forum * * * Again it is urged * * * that if an action were brought to enjoin its collection, * * * the trouble with this proposition is the one suggested as to the claim in the paragraph above; * * *

> The failure to give notice is not a technical irregularity nor a technical defect. It goes it the very substance of the proceedings in as much as it deprives the landowner of valuable rights secured as well by the constitution as by the statute."

This court, in *Central of Georgia R. Company vs. Wright,* 207 U. S. 135, says:

> "Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require."

And in the same case, the court says further:

> "Before an assessment of tax could be made upon omitted property, notice to the taxpayer, and opportunity to be heard, was essential and that somewhere during the process of the assessment, the taxpayer must have an opportunity to be heard and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."

That decision seems to stand unreversed and if that is the law, not only must this case be reversed, but the statute under which the assessment is levied is unconstitutional. This court again, in *Londoner vs. Denver,* 210 U. S. 389, says, at page 385:

> "Where the Legislature of a state instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment, and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevokably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personally, by publication, or by a law fixing the time and place of a hearing."

This was not done nor did the statute require it to be done, nor was there any effort made to do it. This court says further in *Londoner vs. Denver,* at page 386:

> "If it is enough that, under such circumstances an opportunity is given to submit in writing all the objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements may be dispensed with in proceedings of this nature. But even here a hearing in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal."

In the case at bar the plaintiff in error did not have even so much of a hearing as was assumed by this court in the *Londoner* case.

In this case, the Council provided that 3/50ths of the costs should be paid by the village and 47/50ths should be paid by the abutting property owner. In connection with this, the language of this court, in *Norwood vs. Baker,* 172 U. S. 269, at page 290, in discussing the use of the front foot method, is:

> "And that was the method pursued by the village of Norwood. The corporation manifestly proceded upon the theory that the abutting property could be made to bear the whole cost of improvement whether such property were benefited or not, to the extent of such cost."

That is precisely what they did in this case and in the argument against this particular ordinance, the actual facts are stronger than any hypothetical case and may be used to illustrate the effect of such a law. The Council placed the assessment at the rate of $6.05 per front foot, on each side of the street. At least two lots have been abandoned, by reason of the excessiveness of

the assessment. Under the ordinance the New York Central Ry. Co. was assessed in the sum of $6,546.10. A petition was filed for an injunction, which was disposed of by agreement, on May 11, 1923, an agreed order was entered remitting $3,286.12 of the railway assessment and placing it at $6,000.00, the original assessment in the meantime with interest and penalties having reached the sum of $9,286.12. As a part of the consideration for the agreement on the part of the railway company to pay $6,000.00, the Council of the Village of Lindsey vacated to the railway company, a strip of land along their right of way, which means that the railway did not pay anything like $6.05 per front foot, and it also means that the Village of Lindsey did not believe that the benefit amounted to $6.05 per front foot. Another angle was with reference to the assessment of the elevator, within a few hundred feet of the property in this case. It is worth conservatively perhaps $100,000.00. During the year 1918 they did a business of $780,000.00, in the year 1920 they handled 400 cars. Their assessment was $594.66. The court fixed the value of the sawmill property in the case at bar at $2,600.00, and the assessment of $866.67. During the year of 1920, one of their best years, they did a business of $4,032.28. In 1921 the *gross* business was $2,125.00. It is to be borne in mind that the sawmill business was owned by a partnership, the other partner not owning any interest in the land. The elevator was benefited as much as the sawmill property owner, yet their assessment was nearly one-third less, one of them was assessed one-third of its value; the other one-twentieth. It goes without saying that benefits must have been disregarded in one case or the other, and under the Ohio statute this is permissible, under the front foot rule. Further, it is a certainty that the elevator used the street infinitely more than did the sawmill,

yet no opportunity is afforded the owner to show the injustice, without expensive and vexatious litigation.

Supposing that the Village of Lindsey had sued out an order of attachment against this particular piece of real estate in the sum of $1,040.60 and the court has issued an order of sale, without a hearing to the defendant, as in this case, the court would set the action aside, because of violation of the Fourteenth Amendment, just as quick as it could get at it, yet the plaintiff in error is in precisely the same predicament. Suppose again, that the attachment statute of the State of Ohio permitted such a procedure, it would not require much of the time of this court to dispose of the statute and of everything done under it. The assessment law of Ohio allows just such a proceeding as this, under the name of assessment, instead of attachment. The decision and the statute in the case at bar are wrong, or the decision in *Norwood vs. Baker* is wrong, and if that decision is wrong then there is at least one method by which property may be taken from the owner without notice and without a hearing, which this court on numerous occasions has held to be necessary to constitute due process of law.

The Court of Appeals on hearing in that court, reduced the valuation, which under Section 3819 of the code, automatically reduced the assessment and taxed one-half of the costs against the plaintiff in error. If the plaintiff is called upon to pay one-half of the costs it nullifies the benefit derived from the reduction of the valuation. In other words, the court taxes against the plaintiff in error, one-half of the costs incurred by him in his successful effort to prove that the Village of Lindsey was attempting to take from him his property without due process of law and the Court of Appeals found that his contention was true, at least to the extent of approximately $175.00. That is, he sustained his con-

tention and was fined to the extent of one-half of the costs, for bringing it to the attention of the court.

Under the Constitution of Ohio, where a constitutional question is involved, the writ of error to the Supreme Court to review the lower court is a writ of right (Article 4, Section 6, Constitution of Ohio). Bearing this in mind, the only possible construction to be placed upon the Supreme Court's action in this case is that the motion was allowed because "these statutes have so long been held constitutional by the courts of this state, and have so long been accepted and followed in the practice of this state as constitutional, that their constitutionality can no longer be questioned." Counsel for defendant in error was challenged in the Court of Appeals, and again in the Supreme Court of Ohio to cite one case in which the Supreme Court of Ohio had passed upon the points raised in this suit other than *Joyce vs. Barron,* 67 Ohio State 265, and *Railroad vs. Wagner,* 43 Ohio State 75, which are cited in this brief, and he did not produce any. While the Supreme Court of Ohio may set up a Statute of Limitation as against the consideration and raising of constitutional questions involving the State Constitution, it cannot be said that they can enforce a Statute of Limitation against raising a constitutional question under the Federal Constitution. It may be elucidating of the action of the Supreme Court of Ohio to call to mind the fact that under the Constitution of Ohio, before the Supreme Court can declare a statute unconstitutional, all of the judges but one, must vote in favor if the unconstitutionality.

In conclusion we submit that this case must be reversed and remanded with directions to the lower court to grant the prayer of the petition.

ALBERT H. FRY,
Attorney for Plaintiff in Error.